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In the Supreme Court of the United States

OCTOBER TERM, 1960

ELMER SAMUEL CHAPMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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Solicitor General,
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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional provision, statute and rule involved	2
Statement	3
Summary of argument	8
Argument	10
I. In the circumstances here shown, the owner had the right to enter the premises and to enlist the assistance of officers in doing so	11
A. The right of a landlord to enter rented premises in appropriate circumstances is deeply rooted in the common law	12
B. Petitioner's use of the premises gave the landlord a right to possession under local law	14
C. The landlord had the right to enlist the assistance of officers in entering the premises	17
II. Since the entry of the officers was lawful, the seizure of the still was proper	18
Conclusion	19

CITATIONS

Cases:

Abel v. *United States*, 362 U.S. 217	19
Bagshaw v. *Gaward*, Yelverton 96	13
Bashinski v. *The State*, 123 Ga. 508, 51 S.E. 499	14

Cases—Continued

	Page
Baskin v. *Meadors*, 196 Ga. 802; 27 S.E. 2d 696	14
Cradle v. *United States*, 178 F. 2d 962, certiorari denied, 339 U.S. 929	19
Elder v. *Camp*, 193 Ga. 320, 18 S.E. 2d 622	17
Elkins v. *United States*, 364 U.S. 206	10
Ellison v. *United States*, 206 F. 2d 476	19
Fisher v. *United States*, 205 F. 2d 702	19
Foster v. *Vickery*, 202 Ga. 55, 42 S.E. 2d 117	17
Harris v. *United States*, 331 U.S. 145	19
Kaufman v. *Clark*, 7 D.C. 1	15
Kreuter v. *United States*, 201 F. 2d 33	16
Kropp Forge Co. v. *Employers' Liability Assurance Corp.*, 159 F. 2d 536	16
Kurrus v. *Seibert*, 11 Ill. App. 319	15
Markham v. *David Stevenson Brewing Co.*, 51 App. Div. 463	15
Marron v. *United States*, 275 U.S. 192	19
Martin v. *Medlin*, 81 Ga. App. 602, 59 S.E. 2d 519	16
Paper v. *United States*, 53 F. 2d 184	19
Parrott v. *Barney*, Fed. Cas. No. 10,773a	13
Proud v. *Hollis*, 8 English Common Law Reports 4, 5 (1 B. and C. 8)	13
Rivers v. *The State*, 118 Ga. 42, 44 S.E. 859	14
Sackett v. *Suckett*, 8 Pick. (Mass.) 309	13
Six Carpenters' Case, 8 Coke 146a	13
Smith v. *Hightower*, 80 Ga. App. 293, 55 S.E. 2d 872	15
Thruston v. *Mustin*, Fed. Cas. No. 14,013	13
Turner v. *Deming*, 155 F. 2d 181, certiorari denied, 329 U.S. 727	14
United States v. *Joines*, 258 F. 2d 471, certiorari denied, 358 U.S. 880	19
United States v. *Lee*, 274 U.S. 559	18
United States v. *Rabinowitz*, 339 U.S. 56	19
White v. *Thurber*, 55 Hun (N.Y.) 447	15

Constitution, statutes and rule:	Page
Fourth Amendment to Constitution of the United States	2, 10
23 Ga. Code 1403	17
24 Ga. Code 2813	17
58 Ga. Code 106	2, 14
58 Ga. Code 109	14
Statute of Gloucester, 6 Edw. I, Chap. 5. (1278)	13
Rule 41(e), F.R. Crim. P.	2
Miscellaneous:	
Anderson, *Sheriffs, Coroners and Constables*, p. 4	17
4 Kent, *Commentaries*, 82	13
Murfree, *Sheriffs*, Section 1172	17
Tiffany, *Landlord and Tenant* (1910 ed.)	12
Y.B. 8 Hen. 6, 29(B)	13
Y.B. 11 Hen. 4, 75(B)	13

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No. 175

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction (R. 79–82) is reported at 272 F. 2d 70. The opinion of the court of appeals denying a petition for rehearing (R. 86–87) is reported at 273 F. 2d 412.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1959 (R. 83). A petition for rehearing was denied on January 7, 1960 (R. 86). The petition for a writ of certiorari was filed on February 6, 1960, and granted on June 27, 1960 (R. 87; 363 U.S. 836). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, there was an unreasonable search and seizure.

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

58 Georgia Code 106 provides:

> The unlawful manufacture, sale or keeping for sale or disposition of any of the liquors and beverages mentioned in section 58-101, contrary to the law of the State, shall, at the option of the landlord, work a forfeiture of the rights of any lessee or tenant under any lease or contract for rent of the premises when such unlawful act is performed by the lessee or tenant, or by any agent, servant, clerk or employee of the lessee or tenant with the latter's knowledge or permission.

Rule 41(e), F.R. Crim. P., provides:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground

that (1) the property was illegally seized, without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT.

Petitioner was convicted in the United States District Court for the Middle District of Georgia on three counts of an indictment charging the illegal operation of a distillery (R. 1–2, 3). He was sentenced, on May 1, 1959, to imprisonment for a year and a day on count 1. Sentence was suspended on counts 2 and 3, and he was placed on probation for a period of five years, to run concurrently with his sentence on count 1 (R. 76–77). The court of appeals affirmed, 272 F. 2d 70 (R. 79–82).

The issue before this Court arises out of the denial of a motion to suppress the evidence of the illegal still.

1. The property involved was leased through a real estate agency for forty dollars a month by a Mr. Lowe, subsequently identified as petitioner (R. 37, 43, 74–75). The property originally belonged to Mr. Bridgeman and Mrs. Herbert. Bridgeman acquired Mrs. Herbert's interest at about the time of the occurrence in question, but he was not certain whether it was before or afterward (R. 73). On the land, there is a five- or six-room house set back in the woods some two to three hundred feet from a road known as the "Airport Cross Road" or the "Herbert Smart Road." There are other houses, used as residences, up and down the road (R. 25–26, 46, 63).

On Sunday, February 16, 1958, the church to which Mr. Bridgeman belonged had scheduled a "visitation," *i.e.*, a program for becoming acquainted with new members of the community. The pastor asked Bridgeman to call on a family who had recently moved into the neighborhood. Bridgeman said that he would do so, but that he would first visit the people who had moved into his house. When Bridgeman arrived at the house, that afternoon, he found all the shades drawn at the windows.[1] He knocked at the door, but nobody answered (R. 71–72). He testified (R. 72) that he smelled "an awful scent" and he "just knowed what it was by smelling of it." He looked into the open base-

[1] Apparently, Bridgeman was accompanied by an unidentified member of his church..

ment of the house and saw nothing there. After visiting the other family he had been requested to see, he returned to his home and called a state revenue officer, saying he would show him a still (R. 71–72, 8).

The state agent picked up a county policeman and they accompanied Bridgeman to the rented house (R. 9, 46). As they approached, they noticed a strong odor of whiskey mash (R. 27, 41, 46, 53). Bridgeman gave the state officers permission to enter[2] and the county policeman crawled through an unlocked window into the bathroom (R. 9–10, 46, 62, 72). What he saw there was described by him and by others later admitted to the house. Some of the partitions between the rooms had been torn out so that, standing at the front door, a person could view almost the entire house. The bathroom was exposed and the water was running from there to a large still installed in the living room. Vats were fastened to the chimney, and barrels and firewood were on the floor. The pump was nailed to the dining room floor. The

[2] The language of the witness varied in describing how permission was granted. The state agent testified that Bridgeman "told us to go in the window and see what was in there, so we went on in" (R. 13). The county policeman said that Bridgeman gave him permission to go in (R. 46) and that he instructed them to go in (R. 62). Bridgeman testified that he said, "If it's what I think it is, what it smells like, yes, you can have my permission to go in" (R. 72). Petitioner concedes that permission to enter was given by Bridgeman (Pet. 2–3, 6, 7). The district court found, on the motion to suppress, that Bridgeman requested the officers to go in, which finding was affirmed on appeal (R. 81) and on motion for rehearing (R. 86–87).

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officers found approximately 1300 gallons of mash. There was nothing in the house except the things that went with the still and a few small items of food. There was no furniture, bedding, or clothing or anything to indicate that anyone was living there (R. 19–22, 33–34, 38, 40–41, 68).

2. The county policeman remained in the house while the state agent returned Bridgeman to his home and enlisted the aid of federal agents in taking over the still. In the interim, a car drove up to the house and two men got out and unlocked the front door. The policeman attempted to arrest both of them, but succeeded only in detaining the petitioner (R. 11–12, 16, 30–32, 47–49).

Petitioner stated to the policeman that he had come to the house in order to go to the bathroom. He said that he knew who the other man was, but that he would rather not name him. The following morning, after being advised of his right to remain silent, he said, first, that he had gone there to see about renting the house, and, later, that he had gone there to see about buying some whiskey (R. 70–71).

Keys in petitioner's possession fitted the front door of the house (R. 49–50). A Mercury hub cap found on top of the still fitted the Mercury automobile in which petitioner had arrived. The car had a hub cap missing. The floor board in the back and the trunk of the car had particles of sugar and wheat bran on them (R. 69).

3. Petitioner's original motion to suppress, filed October 20, 1958, alleged (R. 3) that he:

> * * * does move this court to suppress for use all evidence obtained by an unlawful search and seizure of a private dwelling without warrant. This defendant does specifically disclaim that said dwelling was his own or that it was under his custody and control at the time of the search but does admit that he leased said premises for a friend and not for his own use and does rely upon this motion in view of the obvious contention of the United States of America to the contrary.

On April 20, 1959, petitioner moved to amend the motion (R. 4):

> * * * by deleting from the body of said Motion (1) the wording "of a private dwelling" and (2) the second sentence thereof and inserting in its stead the following:
>
> "This defendant does show that said unlawful search and seizure was effectuated on February 16, 1958, upon premises known as the Bridgman house, Airport Cross Road, Macon, Georgia. Petitioner does show that at the time of said search he was the lessee of the premises."

Defense counsel offered in evidence pictures of the house in question. When asked by the court why the petition was amended to strike the description of it as a dwelling, counsel stated (R. 7):

> Because, Your Honor, that is the house that we are referring to. Mr. Chapman had not visited that house for sometime, although he had a right to do so, and it is not within—he

> is not able to allege either one way or the other as to whether it was a residence at that time or not, or whose residence it was.

At the conclusion of the evidence on the motion to suppress, counsel stated his position as follows (R. 60):

> I am standing on the fact that this man leased a house which is described in the pictures that I have introduced into evidence and which evidence shows was a residential type house, not a place of business, such as a barn or shed or something of that sort, but a residential type house in a residential district with other houses around it which were occupied, and that [defendant] was the lessee of that house.

SUMMARY OF ARGUMENT

I

The owner of the property in question rightfully came on the land to pay his tenant a social call. Finding to his satisfaction and with good reason that the property was being misused for the purposes of operating an illicit still, he called upon officers of the law to assist him in entering the building. It is the government's position that this entry was proper, in the circumstances shown, and was made as a matter of right.

The right of a landlord to enter rented premises under appropriate circumstances has always been recognized. He may enter to demand payment of rent, to determine whether waste has been committed, to make necessary repairs, to post notice of non-liability for mechanics' liens, or to comply with lawful requirements of local or state authorities. The exercise

of the landlord's prerogative would appear most strongly justified where there is well-founded reason to believe that his property is being grossly abused. Finding the building unoccupied and smelling strongly of whiskey mash, the landlord, we submit, had the right himself to make immediate investigation by entering either through an unlocked door or an unlocked window. Had he done so, his testimony as to what he thereupon saw in full view would have been admissible.

The landlord's right to enter in the circumstances of this case is also supported by provisions of Georgia law which make the operation of an illicit still a nuisance and give the owner a right to immediate possession. Petitioner, moreover, is in no position to assert any special right based upon occupancy of a dwelling house. He did not so occupy it and it did not appear at the time that he so occupied it. He himself took the position in the trial court that his rights were based solely on the oral rental agreement, deleting from his motion to suppress an original reference to the building as a "private dwelling." Petitioner procured the agreement upon which he bases his claimed right by fraudulent misrepresentations as to his identity and as to the purpose for which he was going to use the property. The agreement was therefore vitiated from the outset.

If, as we believe, the landlord had the right to enter the premises to investigate an apparent and a grave misuse of his property, he was not required to do so alone and under circumstances which might entail

serious physical danger. He was entitled to receive the protection and assistance of law officers in so doing. The officer who actually went through the unlocked window was a peace officer, having such an officer's traditional powers to protect life and property. The right of the landlord to enter and to enlist the assistance of officers in so doing does not mean that such a right exists under any and all circumstances. But it existed here, where he had every reason to believe that his premises were being wasted and where common prudence suggested that he should have the protection of the law in making the necessary investigation.

II

Since the entry of the officers was proper, their testimony as to the existence of the illicit still (which was completely open to view) was admissible. They had a right to seize contraband which they had lawfully come upon. Moreover, the actual seizure came only after petitioner's arrest and was incidental thereto.

ARGUMENT

The only question in this case is whether, in the particular circumstances shown, there was an unreasonable search and seizure under the standards of the Fourth Amendment. Even though the decisions of the courts below were rendered before the decision of this Court in *Elkins* v. *United States*, 364 U.S. 206, the fact that state officers conducted the search played no part in the lower courts' determination. The admissibility of the evidence was explicitly rested on the

determination that the search and seizure were reasonable, in the circumstances, under federal standards.

That is the view of the government here. Our position is that when the landlord, paying a social call, found good reason to believe that the leased premises were being wasted and used for criminal purposes, he had authority to enter as a matter of right and to bring officers with him for this purpose. The fact that the building was not actually used as a dwelling, and that petitioner's motion did not even claim that it was, serves to support the reasonableness of the action taken by the landlord and by the local officers.

I

IN THE CIRCUMSTANCES HERE SHOWN, THE OWNER HAD THE RIGHT TO ENTER THE PREMISES AND TO ENLIST THE ASSISTANCE OF OFFICERS IN DOING SO

Bridgeman went to his property to make a social call, proceeding under the impression that the tenant was a law-abiding citizen using the rented premises as a residence. His own account of the visit was as follows (R. 72):

> So, we went down there to my house to visit these people and they had shades up to the windows and all of the shades was down, but we knocked at the door. Nobody come to the door, so I smelled an awful scent around there and I just knowed what it was by smelling of it. I smelled it before I got to the house, and I walked around the house. It has a basement in the bottom and not closed in, just an open basement. I looked in there and wasn't noth-

> ing in there, and so we went on back and made this other visit. And I went to the house and I picked up the telephone and I called the officers and told them what I thought was there.

The officer who was summoned testified that Bridgeman told him that if he would get out there by five o'clock "he would carry me and show me a still" (R. 8). The officers, upon their arrival, smelled the same telltale odor that Bridgeman had (*supra*, p. 5). At this point, with Bridgeman present and with Bridgeman's consent, the county policeman entered the building through an unlocked window. We urge that, in the circumstances, Bridgeman, as the landlord, was entitled to enter the premises as a matter of right and to repossess his property, and that he could properly call on the officers to assist him in making the entry and effecting the repossession.

A. THE RIGHT OF A LANDLORD TO ENTER RENTED PREMISES IN APPROPRIATE CIRCUMSTANCES IS DEEPLY ROOTED IN THE COMMON LAW

A tenant's right to exclusive possession of the rented premises is subject to some qualifications. Thus, at early common law, it was recognized that the landlord had the right to enter "to view waste." It is noted in Tiffany, *Landlord and Tenant* (1910 ed.), Section 3(b)(2), p. 9:

> The landlord is recognized as having, apart from any stipulation, a right of entry on the land while in the tenant's possession for certain limited purposes. He has the right to enter to demand payment of rent or to levy a distress. It has also been said that he may enter to "view waste," that is, to determine whether waste has

> been committed, provided at least that this does not involve the breaking of windows or doors, or to post a notice of non-liability under the mechanics' lien law. He may, no doubt, enter without being guilty of trespass, for the purpose of complying with police and sanitary orders and regulations, and he will generally be exempt from liability for acts required by the state or municipal authorities.

And see *Proud* v. *Hollis*, 8 English Common Law Reports 4, 5 (1 B. and C. 8).

The right of the landlord to enter to view waste seems to be of very ancient origin, being established as early as the year 1410.[3] The apparent lack of contemporary litigation on the point warrants the assumption that ordinarily the right of a landlord to come upon the premises in order to inspect and to ascertain the condition of his own property has not been questioned.[4] Certainly, the exercise of this prerogative would appear most strongly justified where the landlord has persuasive reason to believe that the tenant is engaged in a most serious—indeed, a criminal—abuse of the tenancy. Here, there was every reason for the landlord to make prompt investigation when he detected the odor of whiskey mash coming strongly through the door of

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[3] Y.B. 11 Hen. 4, 75(B). See also, Y.B. 8 Hen. 6, 29(B); *Bagshaw* v. *Gaward*, Yelverton 96; *Six Carpenters' Case*, 8 Coke 146a, 146b.

[4] The Statute of Gloucester, 6 Edw. I, Chap. 5 (1278) penalized waste by forfeiture plus treble damages. It has been said that this statute was a part of the common law brought to this country by the colonists. See *Parrott* v. *Barney*, Fed. Cas. No. 10,773a; *Thruston* v. *Mustin*, Fed. Cas. No. 14,013; *Sackett* v. *Sackett*, 8 Pick. (Mass.) 309; 4 Kent, *Commentaries*, 82.

the unoccupied building. The use of the premises for making whiskey portended—as subsequent events established—that the house was being seriously damaged. If the landlord, instead of calling officers to assist him, had himself entered, whether through an unlocked door or through an unlocked window, it could scarcely be contended that his lips would be silenced from testifying as to the scene of destruction which confronted him. As we argue *infra*, pp. 17–18, the rule should be no different because he sought assistance from law enforcement officers.

B. PETITIONER'S USE OF THE PREMISES GAVE THE LANDLORD A RIGHT TO POSSESSION, UNDER LOCAL LAW

Modern statutory and case law also support a right of entry by the landlord[5] to ascertain the use being made of his property. Title 58, section 106, of the Georgia Code provides that the illicit manufacture of distilled liquor on rented premises works a forfeiture of the rights of the lessee or tenant, at the option of the landlord. Such manufacture constitutes a nuisance under Georgia law (58 Ga. Code 109), and knowing permission by the landlord of such use will justify "padlocking" the premises. *Baskin* v. *Meadors*, 196 Ga. 802, 27 S.E. 2d 696; *Bashinski* v. *The State*, 123 Ga. 508, 511, 51 S.E. 499; *Rivers* v. *The State*, 118 Ga. 42, 44 S.E. 859. Furthermore, a landlord has the right to enter for the purpose of making necessary

[5] There is no substance to petitioner's intimation that Bridgeman's rights were diminished because he may have been the owner of only a "half interest". Tenants in common are seized "per my et per tout". See *Turner* v. *Deming*, 155 F. 2d 181 (C.A. D.C.), certiorari denied, 329 U.S. 727.

repairs. *Smith* v. *Hightower*, 80 Ga. App. 293, 55 S.E. 2d 872, 874–875. See, also, *White* v. *Thurber*, 55 Hun (N.Y.) 447; *Markham* v. *David Stevenson Brewing Co.*, 51 App. Div. 463, 466; *Kaufman* v. *Clark*, 7 D.C. 1, 2.[*] Such repairs would obviously be necessary if the premises had been converted into a distillery. For these reasons—that the premises were apparently being used to perpetrate a nuisance which it was the landlord's duty under the law to abate and which would justify his reassuming full control of the premises—Mr. Bridgeman, on the basis of his own authority and his own proprietary rights, had the right to take reasonable steps to determine conclusively the use that was being made of his property.

The reasonableness of the action by Bridgeman is further emphasized by the fact that he had good reason to believe that the property was not being used as a dwelling house at all—the purpose for which it was let. The house was empty; the shades were drawn; the doors were locked; the open basement was unused. The only thing to indicate that the house was being used at all was the easily recognized odor of whiskey, or whiskey mash, which was so strong that it was immediately evident from out-of-doors.

Petitioner is in no position to assert any special protection attaching to a dwelling house. Indeed, he admitted as much in the district court when he amended his motion to suppress so as to delete the allegation that the house was a private dwelling.

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[*] As to the common law right of a landlord to effect entry in order to abate a nuisance, see *Kurrus* v. *Seibert*, 11 Ill. App. 319.

Petitioner's standing to object to the entry is based squarely on the rental agreement, or oral lease, entered into with the owners. The correlative rights and duties of landlord and tenant in the particular circumstances were therefore pertinent in determining the propriety of Bridgeman's conduct on the afternoon of February 16, 1958, when he requested officers to accompany him to the rented premises. In this connection, it should be noted that petitioner's claim to rightful possession of these premises was founded upon an oral agreement which he entered under the fictitious name of "J. B. Lowe." The use of an assumed name does not invalidate an agreement except where such use is employed for the purpose of defrauding the other party. *Kropp Forge Co.* v. *Employers' Liability Assurance Corp.*, 159 F. 2d 536, 538 (C.A. 7); *Kreuter* v. *United States*, 201 F. 2d 33, 35 (C.A. 10). But here a purpose to defraud is readily inferred. The false identity would obviously make it difficult to trace petitioner and hold him accountable for damage to the premises upon the discontinuance of the illicit operations. Moreover, petitioner had apparently violated the agreement from its inception by devoting the property to an illegal use. *Martin* v. *Medlin*, 81 Ga. App. 602, 59 S.E. 2d 519, 521. Since these violations of the agreement would constitute a good defense to any action by petitioner against Bridgeman for trespass, they are material for purposes of showing that, as between petitioner and Bridgeman, petitioner has no right to complain of the entry.

C. THE LANDLORD HAD THE RIGHT TO ENLIST THE ASSISTANCE OF OFFICERS IN ENTERING THE PREMISES

It was, we submit, normal prudence on Bridgeman's part to call on law enforcement officers[7] before attempting the possibly perilous undertaking of entering the building. If he had found himself confronted by the operators of the still, as the county policeman was later that afternoon, he might well have been placed in physical danger. Certainly, the law does not require foolhardiness in the assertion of one's rights. Moreover, if, as we believe, the owner had the authority to enter the premises as a matter of right, he could properly exercise these rights through one to whom he delegated his authority.

This does not mean broadly, as petitioner suggests, that consent of the landlord is all that is called for in order to dispense with the necessity of a search warrant. A landlord has no right to invade a tenant's privacy whenever he sees fit, and he cannot confer on officers a right of entry which he does not himself have. Certainly, a landlord would have no right, for example, to rummage through papers of his tenant and could confer no such right on officers. All that we argue

[7] The officer who entered through the bathroom window was a county policeman, an officer who has the same powers and duties as a peace officer that a sheriff has (23 Ga. Code 1403). The sheriff has the common law duties of that office, except as modified by statute, including the power and duty to preserve the peace. 24 Ga. Code 2813; *Elder* v. *Camp*, 193 Ga. 320, 18 S.E. 2d 622; *Foster* v. *Vickery*, 202 Ga. 55, 42 S.E. 2d 117. The substance of the duty of a peace officer is to protect life and property. Anderson, *Sheriffs, Coroners and Constables*, p. 4; Murfree, *Sheriffs*, Section 1172.

is that in this case, in the particular circumstances which Bridgeman found when he came to pay his social call, Bridgeman, as landlord, had a right to enter the premises himself and therefore to confer such right of entry upon the officers. Bridgeman, who had let his premises for a lawful purpose, called in the officers only when he reasonably believed that his premises were being gravely abused pursuant to a criminal enterprise. He had a right to call on them to effect an entry which he had a right himself to make.*

II

SINCE THE ENTRY OF THE OFFICERS WAS LAWFUL, THE SEIZURE OF THE STILL WAS PROPER

If the entry into the house by the officers was proper, there can be no serious question of their authority to seize the still which they saw upon their entry. The officers, we emphasize, did not conduct a search after the entry; the still was in full view. See *United States* v. *Lee*, 274 U.S. 559, 563; *Ellison* v.

* If we are correct in our view that the officers' authority to enter is derived, on the facts of the instant case, from the landlord's right to do so, the question whether there was time to procure a warrant cannot be decisive. It is to be noted in this connection (see Point II, *infra*) that no search was made and that the items seized as contraband were open to plain view. We note further that the only evidence as to whether a warrant was in fact obtainable without substantial delay was the testimony of the state officer who stated that he did not think he could have obtained a warrant on a Sunday. R. 13. The same officer testified further (*ibid.*) that he did not believe that he was obliged to seek a warrant inasmuch as he had permission to enter from the owner of the house.

United States, 206 F. 2d 476, 478 (C.A. D.C.); *Cradle* v. *United States*, 178 F. 2d 962 (C.A. D.C.), certiorari denied, 339 U.S. 929; *Fisher* v. *United States*, 205 F. 2d 702 (C.A.D.C.). And the officers had a right to seize contraband which they had lawfully come upon. *Marron* v. *United States*, 275 U.S. 192; *Harris* v. *United States*, 331 U.S. 145; *United States* v. *Joines*, 258 F. 2d 471 (C.A. 3), certiorari denied, 358 U.S. 880; *Paper* v. *United States*, 53 F. 2d 184, 185 (C.A. 4).

Moreover, before the actual seizure was made, petitioner had arrived and had been apprehended. The seizure was also justifiable, therefore, as incidental to his arrest. *Abel* v. *United States*, 362 U.S. 217, 235; *United States* v. *Rabinowitz*, 339 U.S. 56; *Harris* v. *United States*, 331 U.S. 145.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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December 1960.

U.S. GOVERNMENT PRINTING OFFICE 1960

SUPREME COURT OF THE UNITED STATES

No. 175.—October Term, 1960.

Elmer Samuel Chapman, Petitioner, v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April 3, 1961.]

Mr. Justice Whittaker delivered the opinion of the Court.

Acting without a warrant but with the consent of the petitioner's landlord, Georgia law enforcement officers entered—through an unlocked window—and searched petitioner's rented house, in his absence, and there found and seized an unregistered "distillery" and 1,300 gallons of "mash." Soon afterward petitioner was indicted in the District Court for the Middle District of Georgia for violations of the federal liquor laws.[1] He promptly moved the court for an order suppressing the use of the seized items as evidence at his impending criminal trial on the ground that they were obtained by an unlawful search and seizure. After hearing evidence, the court held that the search and seizure were lawful under federal standards and denied the motion.

At the subsequent trial, the evidence sought to be suppressed was offered and received, over petitioner's renewed objections. Upon that evidence, the jury found petitioner guilty, and the court sentenced him to imprisonment for a year and a day. On appeal, the Court of Appeals for the Fifth Circuit affirmed. 272 F. 2d 70. To examine petitioner's claim that the courts below violated the standards governing admissibility of timely

[1] 26 U. S. C. §§ 5601, 5606.

challenged evidence in federal courts, we granted certiorari. 363 U. S. 836.

The relevant evidence is not controverted. It shows the following: One Bridgaman, and another, owned a dwelling house in a wooded area near the Macon, Georgia, airport, which they commonly rented through a rental agency. Understanding that the house had been rented to a new tenant, Bridgaman, on Sunday, February 16, 1958, went to the house for the purpose of inviting the tenants to attend church. Upon arrival he noted a strong "odor of mash" about the house. There was no response to his knock, and although he tried to do so, he was unable to see into the house. He then returned to his home and by telephone, advised the local police department of his observations. Soon afterward two local police officers, Harbin and Chance, arrived at Bridgaman's home, and the three then went to the rented house. They noticed a strong odor of "whiskey mash" coming from the house. After their knock at the door failed to produce a response, they walked around the house and tried to look into it but were unable to do so "because the shades were down." They found that all of the windows were locked, save one in the bathroom. The officers testified that Bridgaman told them "to go in the window and see what was in there." Bridgaman's version of what he said was: "If it's what I think it is, what it smells like, yes, you can have my permission to go in." Thereupon they opened the bathroom window and, with the assistance of Bridgaman and Chance, Harbin entered the house through that opening. Upon entering the house he saw a complete and sizable distillery and 1,300 gallons of mash located in the living room. Apart from some accessories, containers and fire wood, there was nothing else in the house. Harbin then called to Chance that he had found a large still and asked him "to go get some help." Chance immediately left—dropping Bridgaman at

his home—to call the federal officers. While the federal officers were enroute to the house, petitioner drove up, unlocked the front door, entered the house and was immediately arrested by Harbin. The federal officers soon arrived and took custody of petitioner. They also saved samples of the mash, took various pictures of the scene and then destroyed the still and its contents. Neither the state nor the federal officers had any warrant of any kind.

Although the decisions below were rendered prior to this Court's decision in *Elkins* v. *United States*, 364 U. S. 206, the doctrine of that case is not here involved, as the lower courts explicitly rested their determinations on the ground that the search and seizure, though made by state officers, were valid under federal standards. Hence, the only question here is whether those determinations were correct. We believe that they were not.

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Until *Agnello* v. *United States*, 269 U. S. 20, this Court had never directly decided, but had always assumed, "that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein" (*id.*, at 32), but that case explicitly decided that "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are . . . unlawful notwithstanding facts unquestionably showing probable cause." *Id.*, at 33.

At least two decisions of this Court are closely relevant. *Taylor* v. *United States*, 286 U. S. 1, and *Johnson* v. *United States*, 333 U. S. 10. In the *Taylor* case Federal agents had received "complaints" respecting activities at a certain garage in Baltimore and decided to "investigate." As they "approached the garage they got the odor of whiskey coming from within." Looking through a small opening, they saw a number of cardboard cases. Although they had no warrant of any kind, they "broke the fastening upon a door, entered and found one hundred twenty-two cases of whiskey. No one was within the place and there was no reason to think otherwise. While the search progressed, Taylor came from his house and was put under arrest. The search and seizure were undertaken with the hope of securing evidence upon which to indict and convict him." *Id.*, at 5.

In condemning that search and seizure, this Court said that the officers "had abundant opportunity [to obtain a warrant] and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility. . . . Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable search.'" The Court concluded that "in any view, the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed." *Id.*, at 6.

In the *Johnson* case, state narcotic agents, while in the hallway of a hotel, recognized a strong odor of burning opium coming from a particular room. Without knowing who was occupying the room, they knocked and,

after some delay, the door was opened. The agents then entered the room and told the occupant "to consider [herself] under arrest because we are going to search the room." The search produced incriminating opium and smoking apparatus which was warm from recent use. The District Court refused to suppress that evidence and admitted it over defendant's objection at the trial and she was convicted. In reversing, this Court said:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.
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> "There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case." 333 U. S., at 13–15.

Here, as in that case, "No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare the papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear." 333 U. S., at 15.

We think it must be concluded here, as it was in *Johnson*, that "If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required." 333 U. S., at 15. See also *Lustig* v. *United States*, 338 U. S. 74; *United States* v. *Rabinowitz*, 339 U. S. 56; *United States* v. *Jeffers*, 342 U. S. 48; *Jones* v. *United States*, 357 U. S. 493.

Actually, the Government does not contend in this Court that this search and seizure, as such, met the standards of the Fourth Amendment. Instead it says: "Our position is that when the landlord, paying a social call, found good reason to believe that the leased premises were being wasted and used for criminal purposes, he had authority to enter as a matter of right and to bring officers with him for this purpose." It says that, under the common law, a landlord has an absolute right to enter the demised premises "to view waste," and that he should be able to exercise that right through law enforcement officers to whom he has delegated his authority. But it cites no Georgia or other case holding that a landlord, in the absence of an express covenant so permitting, has a right forcibly to enter the demised premises without the

consent to the tenant "to view waste." And so far as our research discloses, no Georgia case so holds.

The only relevant authority cited by the Government is a statement from Tiffany, Landlord and Tenant, (1910 ed.), § 3 (b)(2), p. 9, that "It has also been said that [the landlord] may enter to 'view waste' that is to determine whether waste has been committed, *provided, at least that this does not involve the breaking of windows or doors* . . ." (Emphasis added.) There are several answers to this contention. First, here the landlord and the officers forced open a window to gain entry to the premises. Second, "their purpose in entering was [not to view waste but] to search for distilling equipment . . ." *Jones* v. *United States*, *supra*, at 357. Third, to uphold such an entry, search and seizure "without a warrant would reduce the [Fourth] Amendment to a nullity and leave [tenant's] homes secure only in the discretion of [landlords]." *Johnson* v. *United States*, *supra*, at 14. Moreover, "It is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. [W]e ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime." *Jones* v. *United States*, 362 U. S. 257, 266, 267.

After pointing to the fact that a Georgia statute (Title 58 Ga. Code § 106) provides that the unlawful manufacture of distilled liquor on rented premises shall work a

[1] Only ancient English cases are cited in support of the text.

forfeiture of the rights of the tenant, at the option of the landlord, and that another, (Title 58 Ga. Code § 109) provides that use of a structure for that purpose constitutes a nuisance, the Government argues that, inasmuch as he used the demised premises for the illicit manufacture of distilled liquor, petitioner had forfeited all rights in the premises, and the landlord thus acquired the right forcibly to enter to abate the nuisance, and that he could and did delegate that right to the officers. But it is clear that, before the officers made the forcible entry, the landlord did not know that the premises were being used for the manufacture of liquor, nor had he exercised his statutory option to forfeit the tenancy for such a cause. And the Supreme Court of Georgia has held that a proceeding to abate a nuisance under § 109 "must proceed for the public on information filed by the solicitor general of the circuit." *Kilgore* v. *Paschall*, 202 Ga. 416, 43 S. E. 2d. 520, 521.

It follows that this search was unlawful, and since evidence obtained through that search was admitted at the trial, the judgment of the Court of Appeals must be

Reversed.

MR. JUSTICE BLACK concurs in the result.

SUPREME COURT OF THE UNITED STATES

No. 175.—October Term, 1960.

Elmer Samuel Chapman, Petitioner, v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April 3, 1961.]

Mr. Justice Frankfurter, concurring in the judgment.

Since searches and seizures play such a frequent role in federal criminal trials, it is most important that the law on searches and seizures by which prosecutors and trial judges are to be guided should be as clear and unconfusing as the nature of the subject matter permits. The course of true law pertaining to searches and seizures, as enunciated here, has not—to put it mildly—run smooth. The Court's opinion in this case is hardly calculated, I regret to say, to contribute to clarification. The reasoning by which the Court reaches its result would be warranted were *Trupiano* v. *United States*, 334 U. S. 699 (1948), still law. While the Court does not explicitly rely on it, underlying the present decision is the approach of *Trupiano*. That decision was a short-lived deviation from the course of decisions preceding it and it was specifically overruled by *United States* v. *Rabinowitz*, 339 U. S. 56, 66 (1930). Since the *Rabinowitz* case expresses the prevailing view, the decision in this case runs counter to it. The Court does rely on *Johnson* v. *United States*, 333 U. S. 10, although that case was seriously impaired by *Rabinowitz*, 339 U. S., at 66, dissenting opinion, at 85.

Surely it is fair to say that the lower courts and prosecutors have a right to proceed on the assumption, on the basis of controlling decisions, that whether or not a

search is "unreasonable" turns on the circumstances presented by a particular situation, as a matter of substantive determination. On that test I find it very difficult to conclude that a police officer may not deem adequate the authorization of a landlord to enter his house without a search warrant where he has solid ground for believing that his lessee is utilizing the house as an illegal distillery. It seems to me that it is not at all "unreasonable" not to charge a local police officer with knowledge of the law of Georgia regarding the power of a landlord to abate a nuisance in his house. Apart from charging a policeman with knowledge of the local law relating to landlord and tenant, he certainly would not acquire that knowledge by reading the only Georgia case to which the Court's opinion refers, *Kilgore* v. *Paschall*, 202 Ga. 416, 43 S. E. 2d 520, a case which deals with the procedure of a solicitor general of a Georgia circuit in abating a nuisance by an injunction and tells nothing about the remedy of self-help by a landlord.

In joining the Court's judgment, I do so on the basis of the views set forth in my dissents in *Davis* v. *United States*, 328 U. S. 582, 594; *Zap* v. *United States*, 328 U. S. 624, 630; *Harris* v. *United States*, 331 U. S. 145, 155; *United States* v. *Rabinowitz*, *supra*, at 68. As these opinions elucidate, the Fourth Amendment incorporates a guiding history that gives meaning to the phrase "unreasonable searches and seizures" contained within it far beyond the meaning of the phrase in isolation and taken from the context of that history and its gloss upon the Fourth Amendment. The Amendment in its entirety in the setting of that history decidedly does not leave the phrase "unreasonable searches and seizures" at large.

SUPREME COURT OF THE UNITED STATES

No. 175.—October Term, 1960.

Elmer Samuel Chapman, Petitioner, v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April 3, 1961.]

Mr. Justice Clark, dissenting.

The Constitution condemns only an *unreasonable* search. As my Brother Frankfurter says, that determination "turns on the circumstances presented by a particular situation."[1]

As I read the record, Bridgaman had rented a house to Chapman. On a Sunday morning he called at the house to invite Chapman to church services. However, Bridgaman found Chapman gone, the house locked up and an "awful scent of whiskey mash" all over the place, including an open but empty cellar. He reported these facts to state officers and, at his suggestion, two officers accompanied him to the house. They too smelled, as the Court says, "a strong odor of 'whiskey mash' coming from the house."

Under Georgia law, the use of premises for the manufacture or the keeping of liquor for disposition works "a forfeiture of the rights of any lessee or tenant under any lease or contract for rent . . . ."[2] Bridgaman advised the officers he was the owner of the house, had it leased out, and "instructed" officer Harbin to enter it

[1] I join in his opinion except for the last paragraph in which he concurs in the judgment of the Court.

[2] 58 Ga. Code Ann., 1936, § 106. Aside from eviction, there are no statutory procedural requirements as to forfeiture, the forfeiture operating by virtue of § 106 at the option of the landlord.

and "see what's what in there." The officers found a bathroom window unlocked. Bridgaman "told" the officers "to go in the window" and assisted in "boosting" officer Harbin into the window and on into the house. Inside, the officer found a still set up for operation and 1,300 gallons of whiskey mash in the vats. There was neither household furniture nor other evidence of residential occupancy.

The Court sets aside Chapman's conviction on the ground that this search without a warrant was "unreasonable." For the life of me I cannot see why this is true. I agree with a unanimous Court of Appeals that "under the circumstances of the search here made by the State officers, no illegality was shown."

The "reasonableness" of the search hinges on the rights of the landlord under Georgia law in such a situation. This Court refuses to honor the clear language of § 106, apparently because the Government "cites no Georgia or other case" holding that a landlord may, under the circumstances here, enter on his premises. Instead, it bases its reversal on *Taylor* v. *United States*, 286 U. S. 1, and *Johnson* v. *United States*, 333 U. S. 10, involving entry by officers, unaccompanied by the landlord, into a *home* without a search warrant when there was ample time to secure one. This doctrine, established by *Trupiano* v. *United States*, 334 U. S. 699 (1948), was repudiated and specifically overruled only two years later in *United States* v. *Rabinowitz*, 339 U. S. 56, at 66. Furthermore, none of the cases cited by the Court involve the landlord-tenant circumstance controlling here.

As to Georgia law, the Court itself finds that "no Georgia case" holds that landlords have a right of entry as was exercised by Bridgaman here. It says that, first, the window was forced, second, the entry was for purposes of search and, third, affirmance would "leave [tenant's] homes secure only in the discretion of [land-

lords]." (quoting from *Johnson*, *supra*). The obvious answer to that is: "Chapman was a tenant no more!" The statute provided for the forfeiture of his lease at his lessor's option when he began making whiskey on the premises. And Bridgaman so elected when he directed the officers to enter the house. It was Chapman who was the trespasser, not Bridgaman. The latter was merely repossessing his property, not abating a nuisance. Therefore, § 109 of the Georgia Code, cited by the Court, has no bearing here for that statute merely provides that the Attorney General "may" abate such a nuisance. It has no reference to landlords *qua* landlords. Indeed, the officers here could have abated the nuisance without judicial help by destroying the still and all of its paraphernalia under authority of 58 Ga. Code Ann., 1936 (Cum. Supp. 1958) § 207.[3] Likewise, *Kilgore* v. *Paschall*, 202 Ga. 416, 43 S. E. 2d 520, also cited by the Court, is entirely inapposite. That case merely holds that the special statutory authorization, under an entirely different provision of the Georgia Code, § 110, to close up "blind tigers," *i. e.*, public places of disrepute where gambling, drinking, etc., is carried on, must be brought by the Solicitor of the county wherein they are located. But even if it did hold that actions under § 109 must be brought by the Solicitor, that ruling would have no effect here, precisely because the present factual situation does not come under § 109 but under § 106 and § 207, *supra*.

Furthermore, there was ample reason for not getting a warrant here. It was Sunday afternoon and, as the Georgia officer testified, he had "never got one on Sunday." "I don't think you can." And this was buttressed by his further statements: "Well, I didn't feel no call to

[3] Section 207 provides in pertinent part:

"[W]henever said apparatus [for making liquor is] . . . found or discovered by any sheriff, . . . the same shall be summarily destroyed and rendered useless by him without any formal order of the court."

get one." "The man that owned the house, he was there and he told us to go in the window and see what [']s[] what in there, so we went on in." This shows a complete reliance by the officers on Bridgaman's direction to enter the house. This, I say, made the search entirely reasonable and therefore valid under the Fourth Amendment.

Every moment of every day, somewhere in the United States, a law enforcement officer is faced with the problem of search and seizure. He is anxious to obey the rules that circumscribe his conduct in this field. It is the duty of this Court to lay down those rules with such clarity and understanding that he may be able to follow them. For some years now the field has been muddy, but today the Court makes it a quagmire. It fashions a novel rule, supporting it with an old theory long since overruled. If *Rabinowitz* is no longer law the Court should say so. It is disastrous to law enforcement to leave at large the inconsistent rules laid down in these cases. It turns the well springs of democracy—law and order—into a slough of frustration. It turns crime detection into a game of "cops and robbers." We hear much these days of an increasing crime rate and a breakdown in law enforcement. Some place the blame on police officers. I say there are others that must shoulder much of that responsibility.